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7 **UNITED STATES DISTRICT COURT**  
8 **WESTERN DISTRICT OF WASHINGTON**  
**AT SEATTLE**

9 SAMUEL HELLER, an individual,

10 Plaintiff,

11 v.

12 ELASTICSEARCH, INC., a Delaware  
13 Corporation,

14 Defendant.

No. 2:19-cv-02021 RSM

**AGREEMENT REGARDING  
DISCOVERY OF ELECTRONICALLY  
STORED INFORMATION AND  
ORDER**

15 The parties hereby stipulate to the following provisions regarding the discovery of  
16 electronically stored information (“ESI”) in this matter:

17 **A. General Principles**

18 1. An attorney’s zealous representation of a client is not compromised by conducting  
19 discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate  
20 in facilitating and reasonably limiting discovery requests and responses raises litigation costs and  
21 contributes to the risk of sanctions.

22 2. As provided in LCR 26(f), the proportionality standard set forth in Fed. R. Civ. P.  
23 26(b)(1) must be applied in each case when formulating a discovery plan. To further the  
24 application of the proportionality standard in discovery, requests for production of ESI and related  
25 responses should be reasonably targeted, clear, and as specific as possible.

1     **B.     ESI Disclosures**

2             Within 30 days of entry of this Order, or at a later time if agreed to by the parties, each  
3 party shall disclose:

4             1.     Custodians. The five custodians most likely to have discoverable ESI in their  
5 possession, custody, or control. The custodians shall be identified by name, title, connection to  
6 the instant litigation, and the type of the information under the custodian's control.

7             2.     Non-custodial Data Sources. A list of non-custodial data sources (*e.g.*, shared  
8 drives, servers), if any, likely to contain discoverable ESI.

9             3.     Third-Party Data Sources. A list of third-party data sources, if any, likely to  
10 contain discoverable ESI (*e.g.*, third-party email providers, mobile device providers, cloud  
11 storage) and, for each such source, the extent to which a party is (or is not) able to preserve  
12 information stored in the third-party data source.

13            4.     Inaccessible Data. A list of data sources, if any, likely to contain discoverable ESI  
14 (by type, date, custodian, electronic system or other criteria sufficient to specifically identify the  
15 data source) that a party asserts is not reasonably accessible under Fed. R. Civ. P. 26(b)(2)(B).

16     **C.     ESI Discovery Procedures**

17            1.     On-site inspection of electronic media. Such an inspection shall not be required  
18 absent a demonstration by the requesting party of specific need and good cause or by agreement  
19 of the parties.

20            2.     Search methodology. The parties shall timely confer to attempt to reach agreement  
21 on appropriate search terms and queries, file type and date restrictions, data sources (including  
22 custodians), and other appropriate computer- or technology-aided methodologies, before any such  
23 effort is undertaken. The parties shall continue to cooperate in revising the appropriateness of the  
24 search methodology.

1           a.       Prior to running searches:

2                   i.       The producing party shall disclose the data sources (including  
3 custodians), search terms and queries, any file type and date restrictions, and any other  
4 methodology that it proposes to use to locate ESI likely to contain responsive and discoverable  
5 information. The parties shall meet and confer to attempt to reach an agreement on the producing  
6 party's search terms and/or other methodology. The producing party may provide unique hit  
7 counts for each search query.

8                   ii.       If they reasonably believe that the search terms have not resulted in  
9 the discovery and production of responsive information, the requesting party is entitled to, within  
10 14 days of the producing party's disclosure, add additional search terms or queries to those  
11 disclosed by the producing party, subject to the meet and confer requirements set forth herein.

12                  iii.       The following provisions apply to search terms / queries of the  
13 requesting party. Focused terms and queries should be employed; broad terms or queries, such  
14 as product and company names, generally should be avoided. A conjunctive combination of  
15 multiple words or phrases (*e.g.*, "computer" and "system") narrows the search and shall count as  
16 a single search term. A disjunctive combination of multiple words or phrases (*e.g.*, "computer"  
17 or "system") broadens the search, and thus each word or phrase shall count as a separate search  
18 term unless they are variants of the same word. The producing party may identify each search  
19 term or query returning overbroad results and a counter proposal correcting the overbroad search  
20 or query. Absent a showing of good cause, a search that returns more than 250 megabytes of data,  
21 excluding Microsoft PowerPoint files, audio files, and similarly large file types, is presumed to  
22 be overbroad. The producing party shall search both non-custodial data sources and ESI  
23 maintained by the custodians identified above.

24           b.       After production: Within 21 days of the producing party notifying the  
25 receiving party that it has substantially completed the production of documents responsive to a  
26

1 request, the responding party may request additional search terms or queries. The immediately  
2 preceding section (Section C(2)(a)(iii)) applies.

3 c. Upon reasonable request, a party shall disclose information relating to network  
4 design, the types of databases, database dictionaries, the access control list and security access  
5 logs and rights of individuals to access the system and specific files and applications, the ESI  
6 document retention policy, organizational chart for information systems personnel, or the backup  
7 and systems recovery routines, including, but not limited to, tape rotation and  
8 destruction/overwrite policy.

9 3. Format.

10 a. The parties agree that ESI will be produced to the requesting party with  
11 searchable text, in a format to be decided between the parties. Acceptable formats include, but  
12 are not limited to, native files, multi-page TIFFs (with a companion OCR or extracted text file),  
13 single-page TIFFs (only with load files for e-discovery software that includes metadata fields  
14 identifying natural document breaks and also includes companion OCR and/or extracted text  
15 files), and searchable PDF.

16 b. Unless otherwise agreed to by the parties, files that are not easily converted  
17 to image format, such as spreadsheet, database, and drawing files, will be produced in native  
18 format. A party desiring production in a particular format must specify the format sought in the  
19 request.

20 c. Each document image file shall be named with a unique number (Bates  
21 Number). File names should not be more than twenty characters long or contain spaces. When a  
22 text-searchable image file is produced, the producing party must preserve the integrity of the  
23 underlying ESI, *i.e.*, the original formatting, the metadata (as noted below) and, where applicable,  
24 the revision history.

25 d. If a document is more than one page, the unitization of the document and  
26 any attachments and/or affixed notes shall be maintained as they existed in the original document.

1           4.     De-duplication. The parties may de-duplicate their ESI production across custodial  
2 and non-custodial data sources after disclosure to the requesting party.

3           5.     Email Threading. The parties may use analytics technology to identify email  
4 threads and need only produce the unique most inclusive copy and related family members and  
5 may exclude lesser inclusive copies. Upon reasonable request, the producing party will produce  
6 a less inclusive copy.

7           6.     Metadata fields. If the requesting party seeks metadata, the parties agree that the  
8 following metadata fields need to be produced,: document type; custodian and duplicate  
9 custodians (or storage location if no custodian); author/from; recipient/to, cc and bcc; title/subject;  
10 email subject; file name; file size; file extension; original file path; date and time created, sent,  
11 modified and/or received; and hash value. The list of metadata type is intended to be flexible and  
12 may be changed by agreement of the parties, particularly in light of advances and changes in  
13 technology, vendor, and business practices.

14     **D.     Preservation of ESI**

15           The parties acknowledge that they have a common law obligation, as expressed in Fed. R.  
16 Civ. P. 37(e), to take reasonable and proportional steps to preserve discoverable information in  
17 the party's possession, custody, or control. With respect to preservation of ESI, the parties agree  
18 as follows:

19           1.     Absent a showing of good cause by the requesting party, the parties shall not be  
20 required to modify the procedures used by them in the ordinary course of business to back-up and  
21 archive data; provided, however, that the parties shall preserve all discoverable ESI in their  
22 possession, custody, or control.

23           2.     The parties will supplement their disclosures in accordance with Fed. R. Civ. P.  
24 26(e) with discoverable ESI responsive to a particular discovery request or mandatory disclosure  
25 where that data is created after a disclosure or response is made (unless excluded under Sections  
26 (D)(3) or (E)(1)-(2)).

3. Absent a showing of good cause by the requesting party, the following categories of ESI need not be preserved:

- a. Random access memory (RAM), temporary files, or other ephemeral data that are difficult to preserve without disabling the operating system.
- b. On-line access data such as temporary internet files, history, cache, cookies, and the like.
- c. Back-up data that are duplicative of data that are more accessible elsewhere.
- d. Server, system or network logs.
- e. Any other categories the parties identify and mutually agree upon as the case progresses.

**E. Privilege**

A producing party shall create a privilege log of all documents fully withheld from production on the basis of a privilege or protection, unless otherwise agreed or excepted by this Agreement and Order. Privilege logs shall include a unique identification number for each document and the basis for the claim (attorney-client privileged or work-product protection). For ESI, the privilege log may be generated using available metadata, including author/recipient or to/from/cc/bcc names; the subject matter or title; and date created. Should the available metadata provide insufficient information for the purpose of evaluating the privilege claim asserted, the producing party shall include such additional information as required by the Federal Rules of Civil Procedure. Privilege logs will be produced to all other parties no later than 30 days after delivering a production unless a different deadline is agreed to by the parties.

2. Redactions need not be logged so long as the basis for the redaction is clear on the redacted document.

3. With respect to privileged or work-product information generated after the filing of the complaint, parties are not required to include any such information in privilege logs.

1           4.       Activities undertaken in compliance with the duty to preserve information are  
2       protected from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

3           5.       Pursuant to Fed. R. Evid. 502(d), the production of any documents in this  
4       proceeding shall not, for the purposes of this proceeding or any other federal or state proceeding,  
5       constitute a waiver by the producing party of any privilege applicable to those documents,  
6       including the attorney-client privilege, attorney work-product protection, or any other privilege  
7       or protection recognized by law. Information produced in discovery that is protected as privileged  
8       or work product shall be immediately returned to the producing party, and its production shall not  
9       constitute a waiver of such protection.

10       DATED: February 27, 2020

ARETE LAW GROUP

11  
12                       s/ Jonah O. Harrison (via email  
                              authorization)

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17                       Attorneys for Plaintiff

18       DATED: February 27, 2020

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24                       Attorneys for Defendant

1 **ORDER**

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4 Based on the foregoing, IT IS SO ORDERED.

5 DATED this 28<sup>th</sup> day of February 2020.  
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8 RICARDO S. MARTINEZ  
9 CHIEF UNITED STATES DISTRICT JUDGE  
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